Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
American Telecommunications Systems Inc. Application for Review	)	
	)	
Eureka Broadband Corporation Petition for Reconsideration	)	
	)	
Value-Added Communications, Inc. Petition for Review	)	
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InComm Solutions, Inc. Request for Review	)	
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Five9, Inc. Request for Review	)	

APPLICATION FOR REVIEW OF EUREKA BROADBAND CORPORATION

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APPLICATION FOR REVIEW OF
EUREKA BROADBAND CORPORATION

Pursuant to 47 C.F.R. §1.115, Eureka Broadband Corporation ("Eureka") respectfully submits this Application for Review of the *Memorandum Opinion and Order* of the Wireline Competition Bureau ("Bureau") of the Federal Communications Commission ("Commission" or "FCC"), DA 17-66, released January 13, 2017, in the above-captioned proceeding (the "MO&O"), which remanded to USAC for further consideration the matter which is the subject of the Petition for Reconsideration filed by Eureka on April 23, 2007, nearly ten years ago. As demonstrated below, the Bureau has violated both the ADA and the Commission's Rules in this matter by

(i) refusing to promptly act on either Eureka's Petition for Review or its Petition for Reconsideration in this matter,

(ii) ultimately rendering an arbitrary and capricious decision in conflict with the directive of the Communications Act and Commission Rules that a USF contribution is due *only once* with respect to any revenue stream,

(iii) announcing in its long-delayed MO&O a drastic change in policy and inappropriately demanding its retroactive application against Eureka *almost 13 years after the fact* (and almost a decade after Eureka ceased to have any customers, all such customers having been transferred in 2008 to Broadview Networks, Inc.), and

(iv) reaching an erroneous finding as to the ultimate underlying fact (*i.e.*, whether the Fund has already been fully compensated USF contributions on the revenue at issue). And it has done all of this to the direct detriment of Eureka, forcing Eureka to return to its starting point before USAC after the passage of such an outrageous amount of time that Eureka will be functionally precluded from presenting the evidence newly mandated by the Bureau in order to escape the imposition of a double USF assessment on the subject revenues.

For all the above reasons, the Commission must reverse the Bureau's MO&O remanding Eureka's Petition for Reconsideration back to USAC for further consideration and issue an outright reversal of the *USF Payment Order* as requested by Eureka in its Petition for Reconsideration of Order Compelling Overpayment of USF Funding Obligation *over nine years ago*.

I. QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Bureau violated §54.724 of the Commission's Rules by failing to render a decision on (i) Eureka's Petition for Review of the Administrator's Decision, timely filed June 23, 2006, and (ii) Eureka's Petition for Reconsideration of the *USF Payment Order*, timely filed April 13, 2007, within the timeframe dictated by § 54.724.

2. Whether the Bureau rendered, through the MO&O, an arbitrary and capricious decision in conflict with the directive of the Communications Act and Commission Rules that a USF contribution is due *only once* with respect to any revenue stream.

3. Whether the Bureau announced and retroactively applied, through the MO&O, a drastic change in Commission policy to the effect that in order to avoid having to double pay USF contributions, a *reseller* must be able to prove that its underlying carrier actually submitted reseller-paid USF contributions to USAC, a question of law or policy which has not previously been addressed, let alone resolved, by the Commission.

4. Whether the policy enunciated by the Bureau in the MO&O should be overturned or revised.

5. Whether the Bureau ignored the record and publicly available information which would have mandated grant of Eureka's requested relief in its Petition for Review and its Petition for Reconsideration and thus has reached an erroneous finding as to the ultimate underlying fact (*i.e.*, whether the Fund has already been fully compensated for USF contributions on the revenue at issue).

6. Whether the Bureau's actions in this matter constitute prejudicial procedural error directly and detrimentally impacting Eureka.

II. STANDARD OF REVIEW.

The Commission grants an application for review when it is shown, *inter alia*, that action taken under delegated authority conflicts with a statute, regulation, case precedent, or established Commission policy; the action involves a question of law or policy which has not previously been resolved by the Commission; the action involves the application of a precedent or policy which should be overturned or revised; the action involves an erroneous finding as to an important or material finding of fact; and/or the action involves prejudicial procedural error.[1] As noted above, each of these issues is present in the instant matter.

III. BACKGROUND AND PROCEDURAL HISTORY.

Eureka was acquired by Broadview Networks Holdings, Inc. ("Holdings"), and continues to exist as a wholly-owned subsidiary of Holdings. Since 2008, neither Eureka nor its subsidiaries have had customers, all of their previously served customers having been migrated with

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1 47 C.F.R. §1.115(b)(2).

Commission authorization to the Broadview Networks, Inc.[2], customer base. Holdings files Forms 499-A and Q, and participates in the funding of USF programs, as a consolidated filer on behalf of all of its subsidiaries, including Eureka.

The invoices at issue in this matter were rendered by MCI to Eureka over 13 years ago[3] and were provided to USAC by Eureka as relevant documentation in 2003. During the timeframe relevant to this matter, Eureka utilized the services of a number of carriers, including MCI. Eureka's MCI invoices contained a Universal Service contribution line-item, which Eureka timely remitted to MCI. Eureka never provided MCI with a "reseller certification", nor did Eureka give MCI any other "reasonable expectation" that it would be contributing directly to the USF Fund.

In 2003, Eureka responded to inquiries from USAC concerning the subject revenues, upon which Eureka had been billed USF Contribution line-items from its underlying carrier, MCI (which such line-items Eureka had paid). Eureka also provided as documentation to USAC the invoices it had received from MCI and evidence of the payments remitted by Eureka to MCI totaling $296,200.10, the aggregate amount of the USF Contribution line-item charges invoiced to Eureka by MCI. As noted above, Eureka had not provided MCI with a "reseller certificate" with respect to the revenues; nor did Eureka give MCI any other "reasonable expectation" that Eureka would be contributing directly to the USF Fund with respect to these revenues. To ensure that it would be able to recover these USF contributions from Eureka (since it, rather than Eureka, would be required to contribute to the USF Fund thereon), MCI billed Eureka these USF Contribution

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2 Broadview Networks, Inc., is likewise a wholly-own subsidiary of Holdings.

3 *Order*, In the Matter of: Federal-State Joint Board on Universal Service American Telecommunications Systems, Inc., Equivoice, Inc., Eureka Broadband Corporation, TON Services, Inc., Value-Added Communications, Inc., CC Docket No. 96-45, DA 07-1306, 22 FCC Rcd. 5009 (rel. March 14, 2007), ¶ 1 ("The time periods at issue vary by case, but all fall within the years 1999-2003.") ("*2007 Order*").

line-items and Eureka paid same. The contribution obligation was, and remained, MCI's to satisfy, and neither USAC, MCI nor any other entity has provided any evidence that MCI had not timely done so. Indeed, Eureka's evidence and documentation remains entirely uncontroverted.

USAC did not attempt to contact MCI during its 2003 investigation to confirm whether MCI had, indeed, remitted this $296,200.10 in USF Contribution line-item charges to USAC. Furthermore, to Eureka's knowledge, USAC has taken no actions in the ensuing *13+ years* to ascertain from MCI whether it had, indeed, remitted this $296,200.10 paid by Eureka to the USF Fund. Nor has USAC taken any action to bring MCI, an entity which is arguably the most indispensable party here, into this matter. Rather, USAC inexplicably chose, in 2004, to utilize the very invoices and payment records Eureka had provided USAC to assess upon Eureka the *exact same amount of USF contributions* -- $296,200.10 – which Eureka had already paid to MCI. The logic behind this decision is baffling; apparently USAC decided that since Eureka had already paid $296,200.10 in support of USF program activities, it would not mind voluntarily paying $296,200.10 again on the same MCI revenues. Eureka, however, chose to stand on its rights and on September 30, 2004, filed a Request for Review of the USAC Administrator's Decision. At that time, Eureka incorporated into the record of this proceeding all relevant MCI billing and Eureka payment documentation.[4]

Pursuant to operation of §54.724 of the Commission's Rules, "Time periods for Commission approval of Administrator decisions," the Wireline Competition Bureau then had ninety (90) days within which to "take action in response to [Eureka's] request for review"[5] – in

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4 *See* Appeal of Decisions of the Universal Service Administrative Company Concerning Eureka Broadband Corporation's Revision to FCC Form 499-A and Application of Charges, submitted in CC Docket No. 96-45 on September 30, 2004, at 15-16, 15 n. 22, and Exhibit 1.

5 47 C.F.R. §54.724(a).

other words, until **December 29, 2004**. The Bureau ultimately adopted and released its Order on Eureka's Petition for Review; it delayed doing so, however, until **March 14, 2007**, significantly beyond its §54.724 deadline (even taking into consideration the Bureau's ability to extend this initial 90-day timeframe, but only by an additional "period of up to ninety days").[6]

After ostensibly considering Eureka's Petition for Review -- for two-and-one-half years, the Bureau spent all of one single paragraph in its Order on Eureka's Petition for Review ("*2007 Order*") referring to the heart of Eureka's argument; *i.e.*, that if the Bureau were to enforce the Administrator's decision, Eureka would be forced to make a double payment into the USF Fund and that this result is neither sanctioned nor enforceable under the Commission's Rules governing USF contributions. Of particular note is the fact that nowhere in its *2007 Order* did the Bureau dispute in any way that double payments would, indeed, result from enforcement of the USAC Administrator's decision; nor did the Bureau even mention in passing the record evidence which Eureka had long since provided to both USAC and the Bureau.

Rather, the Bureau, in a surprising display of hubris, declined to even entertain Eureka's position, based solely upon its enunciated (though factually unsupported) rationale that it would be too difficult for USAC to determine "with certainty" that all due USF funds were paid by MCI. Indeed, the Bureau posited that in order to so determine, USAC would have to engage in an extraordinarily complex exercise of cross-auditing all 499s filed by MCI and Eureka.[7] In fact,

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6 Id.

7 Actually, the Bureau posited that USAC would need to audit the revenues of numerous contributing entities in addition to Eureka and all of their respective underlying carriers" *(2007 Order*, ¶ 13) because the Bureau had chosen to resolve in a batch fashion through the *2007 Order* issues raised by not only Eureka but a number of other entities as well. Eureka cannot speak to the evidence these other entities may or may not have provided to USAC and the Bureau, but it is clear from the *2007 Order* itself that the Bureau did not consider the evidence Eureka had provided USAC and the Bureau. It is also clear from the "complications" envisioned by the Bureau in Paragraph 13 of the *2007 Order* that it has spent little to no

this was a gross over-exaggeration of the efforts USAC would have been required to undertake to definitively resolve Eureka's issue.

If the Bureau had, in fact, adhered to its 90-day decision timeline, USAC (or the Bureau itself) could have resolved the essential issue in this matter by placing a single phone call to MCI, or sending a single e-mail, with the very basic inquiry of, "did you, MCI, remit the USF contribution line-item funds in the amount of $296,200.10 paid to you by Eureka on your invoices dated X, Y and Z?" This is a simple yes-or-no question which MCI, a conscientious 499-A filer since the inception of the filing obligation, most likely easily could have answered for USAC back in 2003, or for the Bureau in 2004. MCI might even have been able to do so in 2007, the point in time where the Bureau white-washed the USAC Administrator's original decision.

If MCI's response was, "yes", that would have put the matter to rest.

If MCI's response was, "no", the matter would also have been put to rest since MCI had neither Reseller Certificate nor any other reasonable expectation that Eureka would be contributing directly to the USF Fund on the subject revenues. In other words, the obligation, which has always fallen to MCI – not Eureka – would have been revealed as either (i) previously satisfied by MCI, or (ii) immediately rectifiable (and thereafter would have been immediately rectified) by MCI.

However, more than a decade down the road in 2017, MCI is almost assuredly not in a position to answer this simple question (and Eureka has absolutely no means of ascertaining this information). It is unreasonable for the Bureau to demand, through the MO&O, that Eureka somehow accomplish the impossible or else pay a double USF assessment of $296,200.10, especially since the impossibility has arisen as a direct result of USAC and Bureau delay.

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effort in consideration of the simple, real-world solution to Eureka's situation – simply ask MCI if it had paid USF Contributions on the revenues reflected in the MCI invoices issued to Eureka.

It is likewise unreasonable and completely without factual underpinnings for USAC or the Bureau to have assumed out-of-hand that MCI has not accurately remitted USF Contributions as required by the Commission's rules and regulations. Eureka has been able to locate only one instance, throughout the entire span of USF reporting obligations, in which MCI has unintentionally failed to fully comply with its USF payment obligations. *See* In the Matter of Verizon, 22 FCC Rcd. 12097, FCC 07-122, (rel. July 3, 2007), ¶ 8, in which the Commission announced that

> "[o]n January 5, 2006, MCI informed the Bureau that, as part of a review of its compliance with its universal service and other associated reporting and contribution obligations, MCI discovered that it had erroneously reported its interstate telecommunications revenues on its FCC Form 499-As for the years 2003 and 2004 . . . Verizon [Business Global LLC f/k/a MCI, LLC] informed the Commission and the Universal Service Administrative Company ("USAC") of Verizon's intention to promptly pay in full the difference between the total obligation and MCI's prior contributions. . . Verizon received three invoices from USAC beginning in April 2006, for the underpayment amounts reflected on its amended FCC Form 499-A filings for the years 2003 and 2004. **Verizon paid these invoices in full in a timely manner.**" (emphasis added.)

Eureka is without knowledge as to whether the instant MCI revenues formed a part of the above-referenced under-reporting; however, it is not necessary to know the precise answer to know that the USF Fund has been fully compensated by MCI and no double payment is permitted against Eureka here. Either the subject revenues were not implicated in the above-referenced amendment (in which case, MCI has long since fulfilled its obligation to remit Eureka's USF Contribution line-item payments of $296,200.10 to USAC) or the subject revenues were implicated in the above-referenced amendment (in which case remittances were submitted to USAC "in full" in Spring of 2006 – approximately one year *before* the Bureau finally released its *2007 Order* which again attempted to subject Eureka to a USF double payment liability).

In the face of the Bureau's unreasonable decision on Eureka's Petition for Review, which decision was violative of the FCC's USF contribution rules, Eureka timely filed a Petition for Reconsideration of the Bureau's *2007 Order* on April 13, 2007. As it had with Eureka's Petition for Review, the Bureau again allowed Eureka's prayer for relief to languish seemingly interminably.

Less than two months after Eureka filed its Petition for Reconsideration, however, the Commission released In the Matter of Verizon, described above, providing thereby a very public document which indicated that MCI had brought to the Commission's attention the fact that an internal review of its USF reporting procedures had, in single instance, revealed an unintentional under-remittance to USF. In that same document, the Commission also made clear that the under-remittance had been ***timely rectified through full payment***.

It is obvious, however, that even in the face of this clear evidence of MCI's strong commitment to full compliance with the Commission's USF Rules the Bureau did not thereafter approach its deliberations on Eureka's Petition for Reconsideration from an open, unbiased point of inquiry. The evidence from In the Matter of Verizon, coupled with the MCI invoices and Eureka payment documentation which had long since been provided both USAC and the Bureau, should only have led to an immediate grant of Eureka's Petition for Reconsideration; that is, reversal in full of the USAC Administrator's decision.

It appears that the Bureau did not know what to do and so, outrageously, it chose to do nothing. ***For more than another nine years***. And then finally, on January 13, 2017, the Bureau issued an Order punting the ball back to USAC, "remand[ing] to USAC for further consideration" Eureka's appeal, the subject matter of which the Bureau conveniently mis-styles as "seeking a

credit for contributions"[8] (when in actuality, Eureka's request was for relief from an "Order Compelling Overpayment of USF Funding Obligations", a circumstance which will create a clear violation of Commission Rules and regulations). The Bureau compounds this error by asserting that its remanding back to USAC is "[c]onsistent with precedent", specifically, Universal Service Contribution Methodology, Application for Review of Decision of the Wireline Competition Bureau filed by Global Crossing Bandwidth, Inc., et al., WC Docket No. 06-122, Order, 27 FCC Rcd 13780 (2012), the so-called "*Wholesaler-Reseller Clarification Order*".[9]

The Bureau's reliance on the *Wholesaler-Reseller Clarification Order* is, however, completely misplaced. By the Bureau's own admission, that Order "clarif[ied] how USAC should proceed when a *wholesale provider* demonstrates that it had a reasonable expectation that a customer is a reseller, but the resale provider did not in fact contribute to the Fund, and conversely, when the *underlying provider* did not demonstrate a reasonable expectation and the resale carrier did in fact contribute."[10] It is clear that the entire focus of the *Wholesaler-Reseller Clarification Order* is upon the obligations of the ***underlying provider – here, MCI***, and has no application to, or implications for, any entity other than a telecommunications carrier which is providing services on a wholesale basis. By attempting to utilize the *Wholesaler-Reseller Clarification Order* as its foundation for sending Eureka's grievance back to USAC, the Bureau is extending Commission pronouncements into an entirely new area and seeking to impose upon Eureka a newly-announced evidentiary obligation and burden of proof. Such an evidentiary burden upon resale carriers heretofore has not existed under Commission policy or pronouncement and cannot be supported

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8 MO&O, ¶ 1.

9 Id., and footnote 1.

10 Id., footnote 1.

under the Commission's Rules. Furthermore, attempting to apply any burden of proof to Eureka now – 13+ years down the line from the date it first provided documentation to USAC – is an outrageous over-reach of Bureau authority which cannot pass muster under the ADA or the Commission's Rules. Accordingly, Eureka has been left with no choice but to file this Application for Review as its last avenue of vindicating its rights before the FCC.

IV. ARGUMENT.

In the instant situation, neither Commission Rules, policy nor precedent support the original decision of the USAC Administrator, who has refused to give any weight to the evidence provided by Eureka more than 13 years ago. That evidence, to any reasonable fact finder, leads to only one conclusion: Eureka has already paid whatever USF contributions have been due and owing on the revenues at issue and has thus fully satisfied the Commission's USF contribution obligation and supported all USF programs as required by law. Nothing in either the Commission's Rules or the Communications Act, as amended by the Telecommunications Act of 1996, has ever sanctioned the concept of recovering USF contributions twice on the same revenues; the decision of the USAC Administrator, however, would have that precise effect.

It is the height of dereliction of duty for the Bureau to turn a blind eye to Eureka's plight, essentially signaling to Eureka (and all observers to the proceeding) that it simply does not care about the equities of the situation; it does not care about its duty to uphold the Commission's USF contribution rules; it does not care about keeping the USAC Administrator's actions within the scope of its authority under the Rules, the Act and the ADA. Most outrageous, through its actions (and inactions) here, the Bureau has made very plain that it does not care about its own obligation to act – each time it acts on a USAC Administrator decision – within the timeframe specifically established in §54.724. That tight timeframe exists for the express purpose of providing all entities

affected by the USF programs (whether contributors or Fund recipients) a vehicle for the prompt resolution of disputes concerning USAC and the USF programs. Eureka has been waiting for Bureau action for ***nearly ten years***. Eureka's dilemma presented a simple and, at the outset at least, an easily resolvable situation. Yet the Bureau has converted the matter into another RKO Radio.

With the passage of ten years, this is no longer an easily resolvable case. And it was wholly inappropriate for the Bureau to send the matter back to USAC, providing the Administrator another opportunity, upon "further consideration" of Eureka's unrefuted evidence, to simply re-issue its original holding. Unfortunately, the Administrator's original holding is even more unsupportable today, given the Commission's repeated pronouncements throughout the ensuing dozen years which have provided contributors with every expectation that they will not, and cannot under the USF Rules, be compelled to contribute twice on the same revenue stream.

Yes, the Bureau has erred in numerous significant ways in this matter. Among those errors is the Bureau's imposition of a heretofore unannounced burden of proof which will now apply to resale carriers, and which the Bureau decrees through the MO&O will be applied retroactively backward in Eureka's case over a period of **more than 13 years.** And this, even though no Commission recordkeeping obligation requires, or to Eureka's knowledge ever has required, retention of records for anywhere close to that 13 year timeframe,[11] leaving Eureka limited to its now 13 years' stale evidence.

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11 *See*, for example, the following Sections of 47 C.F.R.: §42.6 (retention of toll telephone records, 18 months); §42.11 (retention of information concerning detariffed interexchange services, 2 years and 6 months after ceasing provision of the service); §54.417 (recordkeeping requirements: lifeline and linkup programs, 3 full proceeding calendar years), §54.516 (recordkeeping requirements: schools, libraries, consortia: 10 years after the latter of last day of applicable funding year or service delivery deadline for funding request); §54.619 (audits and recordkeeping: healthcare providers, 5 years from end of funding year; service providers, at least 5 years after last day of delivery of discounted services); §54.648 (audits and recordkeeping: consortium leaders and healthcare providers, at least 5 years after last day of service;

In so doing, the Bureau has virtually assured that Eureka now has no practical means of obtaining legal redress in this situation. And, significantly, Eureka's predicament can be traced directly to the Bureau's failure – for whatever reason – to take action within the timeframe mandated by §54.724. Had it done so, perhaps MCI would have had confirmatory evidence of its remittance to USAC of the USF contributions made by Eureka, easily and definitively resolving this matter and relieving Eureka from the burden of double payment of those USF contributions.

For this reason, and to rectify the other Bureau errors discussed below, the Commission must, in the interests of equity and justice, overturn the MO&O and issue an outright reversal of the *USF Payment Order* as requested by Eureka in its Petition for Reconsideration of Order Compelling Overpayment of USF Funding Obligations over nine years ago.

1. **The Bureau has violated §54.724 of the Commission's Rules by failing to render a decision on (i) Eureka's Petition for Review of the Administrator's Decision, timely filed June 23, 2006, and (ii) Eureka's Petition for Reconsideration of the *USF Payment Order*, timely filed April 13, 2007, within the timeframe dictated by §54.724.**

There is no ambiguity in §54.724:

"Time periods for Commission approval of Administrator decisions.

> (a) The Wireline Competition Bureau shall, within ninety (90) days, take action in response to a request for review of an Administrator decision that is properly before it. The Wireline Competition Bureau may extend the time period for taking action on a request for review of an Administrator decision for a period of up to ninety days. The Commission may also, at any time, extend the time period for taking action of a request for review of an Administrator decision pending before the Wireline Competition Bureau.
>
> (b) The Commission shall issue a written decision in response to a request for review of an Administrator decision that involves novel questions of fact, law, or policy within ninety (90) days. The Commission may extend the time period for taking action on the request for review of an Administrator decision. The Wireline Competition Bureau may also extend action on a request for review of an Administrator decision for a period of up to ninety days."

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vendors, at least 5 years after last day of delivery of supported services, equipment of facilities in a particular funding year); §64.2104 (wiretap, pen register and trap and trace, changed from 10 years to "for a reasonable time" in 1999).

47 C.F.R. §54.724 [67 FR 13228, Mar. 21, 2002]

Pursuant to §54.724(a), the Bureau was directed that it ***shall*** take action in response to a request for review of an Administrator decision **within ninety (90) days**. Eureka filed its Petition for Review on **September 30, 2004**; the Bureau took no action until **March 14, 2007**, a period of **two years, five months and some odd days**. Thereafter, the Bureau was requested, through Eureka's Petition for Reconsideration, to remedy the errors set forth in its action on Eureka's Petition for Review. It was requested to do so by Eureka on **April 13, 2007**; it did not act until **January 13, 2017** – nearly ten years later.

USAC and the Bureau were both aware, since before USAC even began its inquiry back in 2003, of the importance of a timely resolution of Administrator decision reviews. Even in very important cases involving such issues as on-going law enforcement investigations, a far cry from the situation presented here, the Commission has recognized the necessity of moving the review process along:

> "At the same time, we recognize that indefinitely deferring action on applications could inadvertently harm individuals that ultimately will be cleared of any wrongdoing, particularly in those instances when an investigation takes years."[12]

This dilatory practice is exactly what Eureka has encountered at the hands of first USAC and now the Bureau. And Eureka's nightmare is not over yet; the Bureau has directed that it must now start the process of defending itself all over again more than 13 years down the line, simply because the Bureau did not comply with the timeframe set forth in §54.724.

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12 In the Matter of Federal-State Joint Board on Universal Service, Petition of the Puerto Rico Department of Education to Release Funds Associated with the Schools and Libraries Universal Service Support Mechanism for Years 2001 and 2002, 18 FCC Rcd 25417, 25422-25423 (Nov. 14. 2003).

2. The Bureau rendered, through the MO&O, an arbitrary and capricious decision in conflict with the directive of the Communications Act and Commission Rules that a USF contribution is due *only once* with respect to any revenue stream.

In the very Order which the Bureau cites as its "precedent" for sending Eureka's prayer for relief back to USAC, the Commission has made clear that "our present rules require contribution only once along the distribution chain"[13] and that "USAC should not seek to 'double collect' from a wholesale provider, even if the wholesale provider cannot demonstrate a reasonable expectation."[14] The Bureau's attempt to utilize its "precedent" for the completely opposite proposition that it ***is*** permissible under the Commission's rules to require contribution twice along the distribution chain when USAC can go after *the resale carrier* and that USAC may seek to 'double collect' from a resale entity is the quintessence of arbitrary and capricious action. It is, in fact, the type of "surprise switcheroo" that the Agency itself may not use even in rulemaking proceedings,[15] much less in the review of an individualized USAC Administrator decision which will impact a specifically identified entity and (at this point at least) no other.

In point of fact, the *Wholesaler-Reseller Clarification Order*, released 5 years after Eureka's Petition for Reconsideration was filed, dealt with the following discrete issues, none of which are present in this case and none of which could have put Eureka on notice that the Bureau would here be attempting to turn the Order on its head to potentially impose a second payment obligation upon Eureka in contravention of Commission Rules. That Order deals exclusively with

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13 *Wholesaler-Reseller Clarification Order*, supra., ¶ 11.

14 Id., at ¶ 8.

15 In the Matter of Modernizing the E-Rate Programs for Schools and Libraries Connect America Fund, 29 FCC Rcd 15538 (rel. Dec. 19, 2014), ftnt. 112 ("A federal agency cannot 'pull a surprise switcheroo on regulated entities," Environmental Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005).

the obligations of a ***wholesale provider*** (which in the present case could only be MCI), addressing only the following circumstances:

- "[W]hen a ***wholesale provider*** demonstrates a reasonable expectation that its customer is contributing to the Fund on revenues derived from its services that incorporate the wholesale input, but its customer did *not* in fact do so,"[16]
- "[H]ow to proceed when a ***wholesale provider*** cannot demonstrate a reasonable expectation, but its customer *did* in fact contribute to the Fund,"[17] and
- "[H]ow a **wholesale provider** can demonstrate a reasonable expectation."[18]

3. The Bureau announced and retroactively applied, through the MO&O, a drastic change in Commission policy to the effect that in order to avoid having to double pay USF contributions, a reseller must be able to prove that its underlying carrier actually submitted reseller-paid USF contributions to USAC, a question of law or policy which has not previously been addressed, let alone resolved, by the Commission.

As noted above, the Bureau has cited as its entire precedent for remanding this situation back to USAC an Order, now itself 5 years old, which by its terms applies only to ***wholesale providers***. Thus, for the past 5 years, wholesale providers have understood what they must be able to demonstrate (by a preponderance of the evidence only) to avoid liability not only for a double payment of USF contributions but *also to avoid liability for USF contributions in the first instance – even when the wholesale carrier's customer did not in fact contribute to the Fund.*[19] The Commission has thus told the world that it is willing, because it is an equitable result, to allow theUSF Fund to be underfunded whenever a wholesale carrier has not paid its USF Contributions

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16 *Wholesaler-Reseller Clarification Order*, ¶ 4.

17 Id.

18 Id., ¶5.

19 Id., ¶4.

but can demonstrate "a reasonable expectation" that its customer would have contributed to the Fund.[20]

Eureka has already demonstrated to USAC, and has provided unrefuted evidence to that effect, that it had a reasonable expectation that MCI was going to, and in fact had, contributed to the USF Fund with respect to the MCI revenues billed to Eureka. That should have been the end of USAC's inquiry. Now, in 2017, Eureka is told by the Bureau that it must go back to USAC and go much farther than simply convincing the Administrator of its "reasonable expectation" that MCI was going to remit its USF Contribution line-item charges to USAC (*i.e.*, a "reasonable expectation" akin to that which wholesale providers must demonstrate under the *Wholesaler-Reseller Clarification Order*). The Bureau insists that Eureka must go back 13 years in time and convince USAC by a preponderance of the evidence that MCI ***actually did*** remit Eureka's USF Contribution line-item charges to USAC.[21] And unless it can do so, *13+ years after the fact*, unlike the wholesale carriers described in the *Wholesaler-Reseller Clarification Order* (who have the potential to escape USF Contribution liability altogether), Eureka will have to pay its USF contribution ***twice***.

Nothing in the *Wholesaler-Reseller Clarification Order* gave any entity an expectation that it would be required to pay USF contributions twice – not wholesale carriers, not resale carriers, not end users. In fact, quite the opposite is true. Through the *Wholesaler-Reseller Clarification Order,* the Commission reinforced its overarching policy that **no entity will be required to**

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20 It is worth repeating here that Eureka has, throughout this 13 year ordeal, had a "reasonable expectation" that MCI was going to remit the USF Contribution line-item charges Eureka had paid to MCI to the USF Fund, and that MCI has, in fact, done so. And Eureka is not attempting (as the *Wholesaler-Reseller Clarification Order* permits wholesale carriers to do) to avoid paying USF contributions even once – all it wants to do is be treated like every other entity and ***only have to pay once***.

21 MO&O, ¶1.

contribute more than once. And certainly nothing in the *Wholesaler-Reseller Clarification Order* gave any entity an expectation that it would face double USF liability unless it could affirmatively demonstrate that its service provider ***actually did*** remit to USAC USF Contribution line-item charges paid to the service provider. Under the circumstances, sending Eureka back to USAC more than a dozen years down the line, telling it to defend itself on extremely stale evidence (at a point in time when no additional evidence will be available from the indispensable party here, MCI), or else face double liability for USF Contributions is a completely unsupportable result.

The retroactive effect of the Bureau's ruling is staggering. It is axiomatic that "[r]etroactivity is not favored in the law"[22] and "the APA, as a general matter, forbids retroactive rulemaking."[23] To the extent the Bureau wishes to extend into new law on the Commission's behalf to accomplish this change in policy which will make resale carriers – indeed, anyone who pays USF Contribution line-item charges to a carrier – responsible for payment directly into the USF Fund in the event the underlying carrier does not actually remit such funds to USAC, it should do so only prospectively. And, in Eureka's opinion, any such effort should be done only through exercise of the Commission's rulemaking function. As the Supreme Court emphasized in Security and Exchange Commission v. Chenery Corp., et al., 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1946):

> "Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct . . . The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."[24]

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22 Bowen v. Georgetown University Hospital, et al., 109 S.Ct. 468, 471 (1988).

23 Id.

24 332 U.S., at 202, 67 S.Ct., at 1580.

The Commission agrees:

> "We find that Fusion's suggestion that the current treatment of the U.S.-Haiti route should be applied retroactively to a contract executed in 1999 does not overcome the presumption against giving retroactive effect to administrative rules. . . The presumption against retroactivity also rests on the principle that regulatory actions will not be given retroactive effect absent a clear intent to do so."[25]

Furthermore, the Commission has recognized that

> "[i]n considering whether to give retroactive application to a new rule, the courts have held that where there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given solely prospective effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'" . . . [R]etroactivity may be denied 'when to apply the new rule to past conduct or to prior events would work a 'manifest injustice.' Based on the equitable factors discussed below, we conclude that retroactive application would work a manifest injustice. . .[26]

Forcing Eureka to pay a double USF Fund contribution – 13+ years after paying support to the USF Fund on the subject revenues in the first place, would also constitute a "manifest injustice".

Finally, the Commission has recognized that

> "The courts have made clear that retroactive effect may be denied if the equities so require. The Supreme Court found in *SEC v. Chenery* that 'retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.' The D.C. Circuit has explained that whether to permit retroactive application of an agency decision 'boil[s] down to … a question grounded in notions of equity and fairness.' One relevant factor is

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25 In the Matter of Mary O'Grady, Wall Street Journal, on Request for Inspection of Records, Fusion Telecommunications International, Inc., On Request for Confidential Treatment, 23 FCC Rcd 14236, 14239-40 (rel. Sept. 24, 2008).

26 In the Matters of Federal-State Joint Board on Universal Service, CC 96-45, Access Charge Reform, cc 96-262, Universal Service Contribution Methodology, Petition for Reconsideration and Clarification of the Fifth Circuit Remand Order of BellSouth Corporation, Petition for Reconsideration of the Fifth Circuit Remand Order of Arya Communications International Corporation, Joint Request for Review of Decision of Universal Service Administrator of Cable Plus L.P. and Multitechnology Services, L.P., 23 FCC Rcd 6221, ¶14.

whether there has been 'detrimental reliance' on prior pronouncements by the Commission."[27]

Eureka, indeed the entire telecommunications industry, has relied upon the Commission's many pronouncements related to the USF system, including the basic principles of equity; that is, that the USF programs must be supported for the common good, but at the same time, no entity will be forced to bear more than its fair share of that funding burden and, in particular, no entity will be required to contribute more than once on the same revenue stream. And, since 2012, Eureka has relied upon the Commission's *Wholesaler-Reseller Clarification Order,* which specifically placed certain evidentiary obligations upon ***wholesale carriers – and no other entity*** – as the Commission's assurance that Eureka, which is not now, and was not, in 2003, a wholesale carrier, would never bear the burden of satisfying any sort of "reasonable reliance" standard in order to extricate itself from an unlawful obligation to double pay into the USF support systems. By turning the *Wholesaler-Reseller Clarification Order* on its head to reach this wholly inequitable result, the Bureau has acted in an arbitrary and capricious fashion and must be reversed.

4. The policy enunciated by the Bureau in the MO&O should be overturned.

That this is the case is obvious from items 1. through 3., supra.

5. The Bureau has ignored the record and publicly available information which would have mandated grant of Eureka's requested relief in the Petition for Reconsideration and thus has reached an erroneous finding as to the ultimate underlying fact (*i.e.*, whether the Fund has already been fully compensated for USF contributions on the revenue at issue).

As noted above, the Bureau was in receipt of the precise evidence, in the form of MCI invoices and Eureka payment documentation which USAC had in its possession, *and has had for 13+ years now*, for the purpose of its review of this situation. The Bureau has also had the benefit,

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27 In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, 19 FCC Rcd 7457, ¶22 (rel. April 21, 2004).

since 2007, of In the Matter of Verizon, a demonstration that in the one instance in which MCI has unintentionally failed to fully comply with its USF payment obligations it (i) informed the Commission and (ii) ensured that the situation was immediately rectified through payment of the owed USF Contributions in full. USAC is, and has been for many years, diligent in its efforts to enforce carriers' USF contribution obligations (and, in Eureka's case, it is wildly overzealous in this regard). Accordingly, the absence of other instances of MCI unintentional under-reporting is also a factor of significance which the Bureau should have, but apparently did not bother to, consider.

In short, even though it has not been joined in this action as an indispensable party, MCI has demonstrated itself through the public record to be a "good actor", fully cognizant of its USF contribution obligations and fully willing to satisfy those obligations. It is certainly more likely than not, in such a situation, that having chosen to recover its USF contribution on the revenues it collected from Eureka through a specific USF Contribution line-item, MCI would have actually remitted those line-item charges to USAC as dictated by the Commission's USF Rules.

On the other hand, there is zero evidence that MCI did not do so and USAC has made no efforts to ascertain what MCI has done with respect to the revenues at issue. It is certainly too late for USAC or the Bureau to make such inquiry now. Eureka has presented its unrefuted evidence that it had already paid its USF contributions through the MCI-imposed USF Contribution line-item charges. Even if USAC or the Bureau had considered *only* the unrefuted evidence submitted to it by Eureka, the conclusion would have been clear: Eureka has already satisfied the "preponderance of the evidence" standard the Bureau is ostensibly remanding this matter back to USAC to consider.[28]

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[28] *See* In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC

Only by turning a blind eye to all the above-referenced record evidence has the Bureau arrived at its "remand" posture. It has, in short, refused to seriously consider any record evidence in this matter.

6. The Bureau's actions in this matter constitute prejudicial procedural error directly and detrimentally impacting Eureka.

There can be no doubt that the above errors of the Bureau – the extraordinary length of time Eureka's Petition for Review and Petition for Reconsideration were allowed to languish at the Bureau in derogation of Commission Rules; the Bureau's refusal to adequately consider the evidence presented by Eureka, coupled with other record evidence, and to evaluate that evidence in light of Commission policy pronouncements; the Bureau's ultimate action turning the *Wholesale-Reseller Clarification Order* on its head, extending that polar opposite interpretation to Eureka on a retroactive basis and imposing upon Eureka a burden of proof which did not at the time (and does not now) exist for resale carriers – are exercising a direct and detrimental impact upon Eureka.

But for the Bureau's errors, Eureka would be free – *after more than 13 years* -- from the continuing unjustified risk of having to double pay USF Contributions. (And but for that inexcusable Bureau delay, Eureka would have been free from this unjustified risk years earlier.) No other entity has been required to mount a defense which is not rightfully its burden in the first place, and certainly no other entity has been required to do so on evidence which is more than a

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Docket No. 97-137, *Memorandum Opinion and Order*, 12 FCC Rcd. 2054, ¶46 (1997) ("the preponderance of the evidence standard in civil and administrative actions means the 'greater weight of evidence, evidence which is more convincing than the evidence that is offered in opposition to it.") Here, no evidence has been offered in opposition to Eureka's evidence to USAC and the Bureau. *See also* 5 C.F.R. §1201.56 ("Preponderance of the Evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.") Again, Eureka has already satisfied this standard; there is no need, or legal justification, for "remand for further consideration" to USAC.

decade stale *as a sole and direct result of Bureau delay in derogation of Commission Rules.* Eureka should not be required to do so here.

V. CONCLUSION.

For the reasons stated above, the Commission should reverse the Memorandum Opinion and Order of the Wireline Competition Bureau remanding Eureka's Petition for Reconsideration back to USAC for further consideration and issue an outright reversal of the *USF Payment Order* as requested by Eureka in its Petition for Reconsideration of Order Compelling Overpayment of USF Funding Obligations over nine years ago.

Respectfully submitted,

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